IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No. 428 of 2004
WITH
COMPANY APPLICATION No. 429 of 2004
COMPANY APPLICATION No. 430 of 2004
COMPANY APPLICATION No. 431 of 2004
In
COMPANY PETITION No. 7 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

==========

STEEL AUTHORITY OF INDIA LTD. - Applicant(s)
Versus
O.L. OF GUJARAT STEEL TUBES LTD. & 5 - Respondent(s)

==========

Appearance :
MR AC GANDHI for Applicant(s) : 1,
OFFICIAL LIQUIDATOR for Respondent(s) : 1,
MR SN SOPARKAR, SENIOR ADVOCATE WITH MRS SWATI SOPARKAR for Respondent(s) : 2,
MR KR MODH for Respondent(s) : 3 - 6.

==========

CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

Date : 13/09/2005

COMMON ORAL JUDGMENT

1.The applicant in all these four Company Applications, namely, Steel Authority of India Limited (SAIL) is a Government Company within the meaning of Section 617 of the Companies Act, 1956. The applicant has taken out these Judge's Summons seeking transfer and disposal of the Criminal Case Nos. 1698, 1699, 1700 & 1701 of 2000 pending in the Court of Metropolitan Magistrate, Court No. 5, Ahmedabad, filed by the Opponent No. 2, namely, Shri Apurva Shantilal Shah, Ex-Managing Director of Gujarat Steel Tubes Limited (In Liquidation) against the applicant and Opponent Nos. 3 to 6 who were the Officers of the applicant at the relevant point of time, under Sections 120-B, 114, 34, 409 etc. of Indian Penal Code. The applicant has also prayed for stay against further proceedings of the above referred Criminal Cases pending before the Court of Metropolitan Magistrate, Court No. 5,

Ahmedabad.

2. One Mr. Debashish Pramanik has filed an affidavit in support of the Judge's Summons. Mr. A.C. Gandhi, learned advocate appearing for the applicant has submitted that the Company in liquidation, prior to its liquidation was engaged in the business of production and trading of steel tubes. For the said purpose, the Company in liquidation used to purchase Steel Sheets and other materials, etc. from the applicant Company. The applicant Company used to supply goods as per the orders of the Company in liquidation and raised invoices for the same against the Company from time to time. Since the payment has not been made by the Company in liquidation, the applicant has filed Summary Suit No. 3006 of 1997 in the City Civil Court, Ahmedabad against the Opponent No. 1 Company for recovery of Rs. 5,95,73,087/- being the outstanding amount of various invoices with interest thereon upto 25.06.1997. As a counter blast to the said suit, the Opponent No. 1 Company

has filed Civil Suit No. 637 of 1998 in the City Civil Court, Ahmedabad against the applicant. Both these suits are still pending before the City Civil Court, Ahmedabad.

3.Mr. Gandhi has further submitted that since certain cheques issued by the Opponent Nos. 1 & 2 were returned dishonoured, the applicant Company has filed Criminal complaints against the said opponents under Section 138 of the Negotiable Instruments Act. The Opponent No. 2 in order to escape the liabilities of the Company as well as his personal liability under Section 138 of the Negotiable Instruments Act, had filed criminal complaint registered as Criminal Case Nos. 1698, 1699, 1700 & 1701 of 2000 against the present applicant and Opponent Nos. 3 to 6 on or about 07.08.2000, for and on behalf of the Company, pursuant to the Resolution of the Board of Directors, under Sections 120-B, 34 read with Section 114 & 409 of the Indian Penal Code, 1860. The said complaint is pending in the Court of

Metropolitan Magistrate, Court No. 5, Ahmedabad.

4.Mr. Gandhi has further submitted that the applicant Company as well as Opponent Nos. 3 to 6 have filed an application in the above criminal complaints before the Metropolitan Magistrate Court for discharge of the applicant as well as Opponent Nos. 3 to 6 and the said application is pending. The applicant and Opponent Nos. 3 to 6 having come to know that the Company had been ordered to be wound up and the Official Liquidator has been appointed as the Liquidator of the Company, gave an application dated 10/29.07.2003 inter alia pointing out to the learned Metropolitan Magistrate that the Company has been ordered to be wound up and the Official Liquidator has been appointed as the Liquidator of the Company and, therefore, as per law, the Opponent No. 2 cannot continue as the complainant and prosecute the criminal litigation for and on behalf of the Company and that the notice of the proceeding is required to be issued to the Official Liquidator as Liquidator of the

Company. Mr. Gandhi has further submitted that the learned Magistrate, without appreciating the provisions of the Companies Act, 1956, by an order dated 25.02.2004 has dismissed the said application inter alia on the ground that no legal provisions are pointed out requiring the Court to issue notice to the liquidator of the Company. As per the provisions contained in Section 445 read with Section 457 of the Companies Act, 1956, once winding up order has been passed and the Official Liquidator is appointed as the Liquidator of the Company and the order of winding up duly filed with the Registrar of Companies shall be deemed to the notice of discharge to the Officers and Employees of the Company and thereafter the Liquidator alone is empowered, that too, with the sanction of the Court, inter-alia to institute or defend any Suit, Prosecution or other Legal proceedings, Civil or Criminal in the name and on behalf of the Company. He has, therefore, submitted that Opponent No. 2 is now Functus-Officio and has no power or authority whatsoever to prosecute further Criminal Case Nos.

1698 to 1701 of 2000 filed by the Company in liquidation through him against the present applicant and Opponent Nos. 3 to 6 after passing of the winding up order.

5.Mr. Gandhi has further submitted that Opponent No. 2 is not bonafide prosecuting the criminal cases in question and at any rate now, he cannot be permitted to prosecute the criminal prosecution any longer. The Opponent No. 2 is interested only to escape altogether or to atleast delay the criminal proceedings filed by the applicant and others against him. On the other hand, the Opponent Nos. 3 to 6 as Officers of the applicant are liable to be transferred anywhere in India and accordingly, will cause immense hardship and harassment, if the pending impugned criminal prosecution is permitted to be continued in the Trial Court. Reading the Complaint at Annexure A to this application, no prima facie offence is made out against the applicant and Opponent Nos. 3 to 6 and the same deserves to be quashed and set aside. In view of

the approach of the learned Metropolitan Magistrate and it is evident from the order passed by him on the application given by the applicants that it is just and proper and in the interest of justice that pending criminal complaints should not be proceeded further before the learned Magistrate's Court. Mr. Gandhi has, therefore, submitted that the pending criminal cases be transferred to this Court in exercise of jurisdiction and powers under Sub-Section (2) and (3) of Section 446 of the Companies Act, 1956 and till the disposal of these applications, the proceeding in the Trial Court are required to be stayed as prayed for.

6. In support of his submissions, Mr. Gandhi has invited the Court's attention to the provisions contained in Section 446 of the Act. Section 446 reads as under :-

446. ***Suits stayed on winding up order***.

(1) "When a winding up order has been made or the Official Liquidator has been appointed as

provisional liquidator, no suit or other legal proceedings shall be commenced, or if pending at the date of winding up order, shall be proceeded with, against the Company, except by leave of the [Tribunal] and subject to such terms as the [Tribunal] may impose.

(2) [The Tribunal] shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of-

(a) any suit or proceeding by or against the Company;

(b) any claim made by or against the company (including claims by or against any of its branches in India);

(c) any application made under Section 391 by or in respect of the Company;

(d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in

course of the winding up of the Company;

Whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the Company, or before or after the commencement of the Companies (Amendment) Act, 1960."

7. The plain reading of Section 446 makes it clear that it empowers the Court to entertain or dispose of any suit or proceeding by or against the Company irrespective of the fact whether such suit or proceeding has been instituted or is instituted before or after the order for the winding up of the Company. Here in the present case, admittedly, on behalf of the Company in liquidation, the Opponent No. 2 in his capacity as Managing Director of the Company has filed Criminal complaints against the applicant Company and Opponent Nos. 3 to 6 before the order of winding up passed by this Court and the said proceedings are still pending before the

Court of Metropolitan Magistrate, Court No. 5, Ahmedabad. In view of the provisions contained in Section 446 (2)(a), the Magistrate's court has no jurisdiction to entertain or dispose of the said criminal complaints filed by the Company in liquidation through its Managing Director against the applicant and Opponent Nos. 3 to 6. Mr. Gandhi has further submitted that the term 'proceeding' used in Section 446(2)(a) is very wide and it inter alia includes criminal proceedings. In support of this submission, he relied on the decision of the Punjab & Haryana High Court in the case of ***Official Liquidator Khosla Fans (India) P. Ltd. (In Liquidation) V/s. Ramesh Khosla and Others, 53 Company Cases 858*** wherein the Court has held that Section 446 of the Companies Act, 1956 is a special provision, which has vested the High Court with jurisdiction to entertain or dispose of any suit or proceedings by or against the Company. The prosecution sought to be launched by the Official Liquidator on behalf of the Company is a proceeding by the company against the acts of the Office

bearers. There are offences against the Act in which the Official Liquidator has to launch the prosecution proceedings. In appropriate cases, the High Court may exercise jurisdiction in entertaining or transferring the said proceedings to do complete justice between the parties, especially when the Company has been ordered to be wound up. Rule 9 of the Companies (Court) Rules, 1959, also provides that nothing in the Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to give such direction or pass such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the Court. The Court has, therefore, held that the High Court can exercise its jurisdiction in suits and proceedings including criminal proceedings in appropriate cases by or against the Company filed by the Official Liquidator.

8. Mr. Gandhi has further relied on the decision of the Delhi High Court in the case of Official Liquidator, R.C. Abrol and Co. P. Ltd. V/s. R.C.

Abrol and others, 47 Company Cases 537 wherein the Official Liquidator filed a criminal complaint in the High Court, which ordered winding up of the Company, against its directors and officials under Sections 538 & 541 of the Companies Act, 1956, on account of failure to hand over books of account and records of the Company and failure to keep proper books of account during the two years immediately preceding the winding up of the Company. While returning the plaint to the Official Liquidator (Complainant) to be filed before the proper Court, the Court held that the High Court's jurisdiction to take cognizance of offences was restricted to that contained in Section 454(5A) of the Companies Act, 1956, and the High Court had no jurisdiction to take cognizance of any other offences such as the offences under Section 538 or Section 541. The Court has, however, made it clear that the High Court had power under Section 446 (3) to transfer a pending complaint before the Magistrate for trial to itself. Sub-section (3) of Section 446 is omitted

by the Companies (Second Amendment) Act, 2002. Prior to its omission, it stood as under :-

" Any suit or proceeding by or against the Company which is pending in any Court other than that in which the winding up of the Company is proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by that Court. Mr. Gandhi has , therefore, submitted that even after deletion of Sub-section (3), the Court can certainly exercise its power under Section 446(2) (a) of the Act.

9. Mr. Gandhi has further submitted that the learned Magistrate has committed a serious error in law in not entertaining the application moved by the applicant Company for joining the Official Liquidator as party. It is contrary to the provisions contained in Section 446 of the Act. In support of his submission, he relied on the decision of the Calcutta High Court in the case of **International Shipping Limited V/s. Chandpur Jute**

Co. Ltd., 52 Company Cases 121 wherein it is held that after a company is wound up, it is only the Official Liquidator who becomes the custodian of all the assets and properties of the Company which come into the custody of the Court under Section 456 of the Companies Act, 1956, read with r. 233 of the Companies (Court) Rules, 1959, and, in law and in fact, nobody else has the right to represent the Company save and except the Official Liquidator. The Court in that case has held that the order of dismissal of a suit, which was ripe for hearing, passed by the Trial Court on the submissions of the Solicitor for the Plaintiff-Company after the passing of the winding up order relating to itself without notice of the suit to the Official Liquidator on a complete suppression of material facts (as to the winding up) from the Trial Court, out of sheer negligence and oversight of the solicitor, when Chap. 10, r. 35, itself provides that the suit should be placed in the special list on notice to the parties or their attorneys, must be held to be a nullity and can have no legal

effect whatsoever, as, after the Company went into liquidation without notice to the Official Liquidator, no suit can be dismissed under the special list or any other list and the Court has no jurisdiction to dismiss the same without giving notice to the parties, and the order being a nullity, no right can flow to anybody, either to the plaintiff or to the defendant, and the suit would be still alive.

10.Mr. Gandhi has further submitted that after the passing of winding up order by this Court, the Opponent No. 2 who has filed the complaints against the applicant and Opponent Nos. 3 to 6 has no right to prosecute the said complaint as the powers of Directors of a Company cannot be exercised once the Company goes into liquidation and its property and assets come under the custody of the Court under the provisions of the Act. In this connection, he relied on the decision of the Calcutta High Court in the case of **Shree Tej Protap Textile Mills V/s. Granaries Ltd. and others, 31 Company Cases 610**

wherein it is held that the Directors cannot file a suit against a debtor of the Company even if the provisional liquidator willfully refuses to institute a suit for the purpose. The remedy of the Directors, should the liquidator cause loss by refusing to file a suit, would be against the liquidator himself and willful refusal might be a proper ground for his removal.

11.Mr. Gandhi has further relied on the decision of the Karnataka High Court in the case of **Maharashtra State Co-operative Cotton Growers Marketing Federation Limited and Another, 70 Company Cases 440** wherein it is held that before a reference can be made to the Board for Industrial and Financial Reconstruction to institute an enquiry into the causes of sickness of the industrial Company and make recommendations for its rehabilitation, the pre-requisite is the existence of a Board of Directors to the industrial company which is sick. If that board of directors does not exist, the competence to make a reference disappears. From

the date of communication of the order of the Court winding up the industrial Company, its board of directors ceases to hold office for all purposes other than for filing the statement of affairs in aid of the winding up proceedings. Therefore, the reference made, if any, by any body of persons claiming to be the board of directors after the winding up order was passed, was wholly incompetent and the provisions of Section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985, were not attracted.

12.Mr. Gandhi has further relied on the decision of Allahabad High Court in the case of **Sushila Pulp and Papers Limited V/s. Official Liquidator and Others, 124 Company Cases 281** wherein it is held that in view of Sections 445(3) and 457(1)(a) of the Companies Act, 1956, a Company under liquidation can be represented only by the Official Liquidator and any action for or on behalf of the Company has to be taken only through the Official Liquidator. Except in cases where the business of

the Company is continuing, the Directors cannot appeal against the order.

13.Mr. Gandhi has further relied on the decision of the Hon'ble Supreme Court in the case of **Sirmur Chemical and General Industries Limited V/s. Union of India and another, 32 Company Cases 826** wherein the Hon'ble Supreme Court has held that when an order for winding up a Company is made, the Managing agent of the Company ceases to be the Managing agent as from the date of the commencement of the winding up and he loses his right to institute any legal proceeding or appeal from any legal proceeding started by him, in the name and on behalf of the Company, for on an order of winding up being made no person other than the liquidator has the power to institute or defend any legal proceedings on behalf of the Company. The Court has further held that the rule that an appeal is a continuation of the suit cannot be applied in such a case so as to give a right to the managing agent to file an appeal after the winding up order has

been made from a decree in a suit instituted by him.

14.Based on the aforesaid statutory provisions as well as the decided case law, Mr. Gandhi has strongly urged that Opponent No. 2 has no right to continue or prosecute the pending criminal complaints filed by him on behalf of the Company in liquidation against the applicant and Opponent Nos. 3 to 6. He has, therefore, submitted that the learned Metropolitan Magistrate has committed an error in not entertaining the application filed by the applicant Company. He has, therefore, submitted that in the interest of justice and for proper and appropriate adjudication of the issue raised by the applicant, all the four criminal cases which are pending before the Court of Metropolitan Magistrate at Ahmedabad should be transferred to this Court while exercising power under Section 446(2)(a) of the Act.

15.Mr. S.N. Soparkar, learned Senior Counsel

appearing with Mrs. Swati Soparkar, learned advocate for respondent No. 2 has submitted that the present applications filed by the applicant Company are nothing but abuse of process of law and such applications should not be entertained by this Court. He has further submitted that before filing the present applications before this Court, the applicant Company has tried to delay the proceedings by filing several applications before the Trial Court. All these Criminal cases were filed on 05.08.2000 wherein the learned Metropolitan Magistrate, Ahmedabad has issued process under Section 120-B, 34, 114, 409 of Indian Penal Code on 17.08.2000. The present applicant and the Opponent Nos. 3 to 6 had not challenged the process issued by the learned Metropolitan Magistrate before the learned Sessions Judge by filing Criminal Revision Application or before this Court by filing quashing petition under Section 482 of the Code of Criminal Procedure Code. After service of summons, the accused persons have preferred a stay application dated 27.07.2001

wherein written arguments were filed on 03.01.2002. After hearing the parties, the said stay application was rejected on 30.09.2002. Thereafter, the present applicant and the Opponent Nos. 3 to 6 had applied for time to file an appropriate petition before the higher Court for challenging the order passed below the stay application but till this date, the said order has not been challenged by them. He has further submitted that on 29.07.2003, original accused i.e. applicant and Opponent Nos. 3 to 6 have preferred an application for issuing notice to the Official Liquidator wherein reply was filed on 11.01.2004 and after hearing the parties on merits, the said application came to be rejected by a reasoned order dated 25.02.2004 and the matter was kept for recording the evidence of the complainant. The original accused, however, on one or the other pretext asked for adjournment and did not allow the matter to be proceeded further. He has further submitted that at one of the adjourned dates, the applicant had to pay to the original complainant

upon the order of the Magistrate, a cost for delaying the proceedings on frivolous grounds. The time was also sought for on the ground that the original accused wanted to challenge the aforesaid order, but till this date, the said order has not been challenged and the present applicant thereby killed time of almost five years on various grounds and now the original accused has filed the present application before this Court to further delay the matter.

16.Mr. Soparkar has further submitted that the Company in liquidation has filed Civil Suit No. 6371 of 1998 in the City Civil Court at Ahmedabad for recovery of excess amount charged by the present applicant agreegating to Rs.5,41,08,437/- against the present applicant and the said suit is still pending before the Civil Court. The original accused have misappropriated large amount of Rs.9,70,11,467/- and in respect of the said misappropriated amount, four criminal cases were filed against them. The present applicant had

filed a Summary Suit No. 3006 of 1997 in the City Civil Court, Ahmedabad against the Company in liquidation for recovery of Rs. 5,95,73,087/- being the outstanding amount of various invoices with interest thereon upto 25.06.1997 which is pending. He has further submitted that on the same subject matter, the present applicant had also filed a private complaint being Inquiry Case No. 240 of 1997 under Section 420 read with 34, 114 of Indian Penal Code through its Officer Mr. S. Ramchandran, who is accused No. 2 in the above referred four criminal cases against the Company in liquidation and its Directors before 9th Metropolitan Magistrate Court who has ordered police inquiry under Section 156 (3) of the Code of Criminal Procedure which was registered as M. Case No. 48 of 1997 with Naranpura Police Station. Inquiry Case No. 240 of 1997 was challenged by respondent No. 2 - original complainant before this Court by way of filing quashing petition being Cri. Misc. Application No. 4373 of 1997. The said application was allowed by this Court vide its order dated 16.06.1998 whereby

Inquiry Case No. 240 of 1997 – Naranpura Police Station M. Case No. 48 of 1997 was ordered to be quashed and set aside. Mr. Soparkar has further submitted that the present applicant challenged the said order before the Hon'ble Supreme Court of India by way of filing Petition for Special Leave to Appeal (Criminal) No. 3528/1998 which came to be dismissed by the Hon'ble Supreme Court on 30.08.1999. The present applicant had also filed 13 criminal complaints under Section 138 of the Negotiable Instruments Act being Nos. 3090/97 to 3101/97 and 4140/97 against the Company in liquidation and others on the same subject matter in the Court of 9th Metropolitan Magistrate Court, Ahmedabad which are pending. The respondent No. 2 had filed 13 Special Criminal Application Nos. 1066 to 1077 & 1167 of 1997 for quashing the said criminal complaints before this Court. During the course of proceedings in the said petitions for hearing, the respondent No. 2 had filed additional affidavit on 17.03.1998 to which Ms. Ramchandran had filed an affidavit-in-reply dated 18.03.1998

which contained false statements and averments. The respondent No. 2 had, therefore, filed Cri. Misc. Application No. 1310 of 2000 on 29.02.2000 which was admitted by this Court on 10.01.2001 and the same is pending for final hearing.

17.Mr. Soparkar has further submitted that the above referred criminal complaints were filed by the respondent No. 1 Company through respondent No. 2 as Managing Director of the respondent Company before the order of this Court appointing Provisional Liquidator and Official Liquidator and before passing of the winding up order of respondent No. 1 Company. The said four criminal complaints are filed against the present applicant and Opponent Nos. 3 to 6 are for offences punishable under the Provisions of Indian Penal Code and, therefore, the provisions of Section 446 read with Section 457 of the Companies Act do not come in the way of the present prosecution pending before the 5th Metropolitan Magistrate. The word “suit or legal proceeding” used in Section 446(1)

of the Companies Act do not include prosecution.

18.In support of this submission, Mr. Soparkar has relied on the decision of the Bombay High Court in the case of **Ion Exchange Finance Limited V/s. Firth India Steel Company Limited (In Liquidation), 103 Company Cases 666** wherein it is held that wherever Parliament chose to confer power on the Company Court to try criminal offences, it has so done. The main purpose or object behind sections 446 & 442 of the Companies Act, 1956, is that in respect of a Company in winding up or where proceedings in winding up have been filed, the Company Court is to see that the assets of the Company are not recklessly given away or frittered. In this context, one has to remember that the main duty of the Company Court is to oversee the affairs of the Company to meet the debts of its Secured or its Unsecured Creditors as also of its shareholders and powers have been accordingly conferred on it. It is further held that for the purposes of the Companies Act, “court” means under Section 2(11)

the Court having jurisdiction under the Act with respect to the matters relating to the Company under Section 10 of the Act and in respect of any offence under the Act, the Judicial Magistrate, First Class, or Presidency Magistrate having jurisdiction. The ordinary power of the Magistrate to entertain a complaint is not controlled by the company court. The power to try criminal offences is conferred on the Magistrate and Sessions Courts by virtue of the provisions of the Code of Criminal Procedure, 1973. The Court has further held that the expression “legal proceedings” in Section 446 of the Companies Act means only those proceedings which have a bearing on the assets of a company in winding up or have some relation with the issue in winding up. It does not mean each and every civil proceeding which has no bearing on the winding up proceeding or criminal offences where the Company was liable to be prosecuted. It is not as if there is no control over such other proceedings. The liquidator under Section 537, if he feels the need, can apply to the company court to intervene and the

Company court can always grant or refuse sanction. The language of Section 621(1) will therefore indicate that the Company court has no control over offences under the Act except under Section 545. The Court has further held that the language of Section 141 of the Negotiable Instruments Act, 1881, is clear. The expression used is “every person who was in charge of the company when the offence was committed”. A complaint in such a case can only be at the instance of a payee or the holder in due course. Such a complainant, of course, is also entitled to file his claim as a Creditor. If this is accepted, the easiest way out for a company which is deemed to have committed an offence will be to sponsor a petition and then apply for stay of proceedings under Section 442. The Company Court itself under Section 446 cannot try the complaint. Realisation of such fine under the provisions of the Land Revenue Code would be “other legal proceedings”. Sale and attachment of the property of the Company is subject to Section 537. Thus it is these other legal proceedings

which the Company Court could look into as it would have a bearing on the assets of the Company. The Company Court in winding up would not have jurisdiction to stay the criminal prosecution nor is permission of the Company Court required to prosecute the Company for offences committed before a Provisional Liquidator is appointed or an order of winding up is made. In a rare case if the Liquidator himself is to be held liable for acts of the Company, there is always power in him to seek permission of the Company Court to prosecute or defend such prosecution. The expressions “legal proceedings” or “other legal proceedings” for the purpose of Sections 442 & 446 must be read ejusdem generis with the expression “suit” and can mean only civil proceedings which have a bearing in so far as the winding up is concerned namely realisation of the assets and discharge of liabilities of the Company. Therefore, the expression “legal proceedings” or “other legal proceedings” would not include a criminal complaint under Section 138 of the Negotiable Instruments

Act, 1881.

19.Based on the aforesaid decision of the Bombay High Court, Mr. Soparkar has submitted that this Court exercising its power as a Company Court in its original jurisdiction does not have power or jurisdiction to stay criminal prosecution for commission of offences committed before Provisional Liquidator is appointed or an order of winding up is made. He has, therefore, submitted that all the four applications filed by the present applicant are required to be rejected with cost. Mr. Soparkar has further submitted that the present applicant and the Opponent Nos. 3 to 6 had successfully delayed the aforesaid criminal cases for a period of almost five years and granting stay at this stage will further delay the matter which would be prejudicial to the Company in liquidation as in that case, there is every possibility of the evidence being lost and proceedings getting abated. There is also possibility that the accused may not be alive or even the witnesses may not be available

to give evidence. He has, therefore, submitted that the present applications be rejected.

20.Since the arguments canvassed by Mr. Soparkar are based on the affidavit-in-reply filed on behalf of respondent No. 2 on 29.07.2005, Mr. A.C. Gandhi, learned advocate appearing for the applicants has objected to filing of the affidavit-in-reply. The present applicant has, therefore, filed affidavit-in-rejoinder to the said reply.

21.Mr. A.C. Gandhi has submitted in rejoinder that the reply filed by the respondent No. 2 cannot be considered by this Court as it is being filed at a very late stage after the arguments by both the parties at length were over long back and when this Court was about to pass the order to transfer the criminal complaints pending before the Magistrate to this Court, at that stage, the matters were adjourned only for the limited purpose of issuing notice to Opponent Nos. 3 to 6 and at the said hearing, it was specifically submitted on behalf of

respondent No. 2 that he did not intend to file any affidavit. Under these circumstances, the affidavit-in-reply filed by respondent No. 2 after the arguments are over should not be taken on record and should be ignored by the Court. Mr. Gandhi has further submitted that the complaints were filed by the respondent No. 2 as the Chairman of the Company in liquidation. Now when the Company was already ordered to be wound up, the respondent No. 2 has no authority whatsoever and he has no locus standi to file any proceeding or affidavit representing the Company in liquidation. The right to continue in pending legal proceedings of the Company in winding up is only with the Liquidator of the Company and no one else. The Board of Directors of a Company in liquidation becomes functus-officio from the date of winding up of the Company and therefore, none of the Directors is competent to proceed with any proceedings on behalf of the Company. Mr. Gandhi has further submitted that various High Courts have taken the view that the powers of the Board of Directors of

the Company in liquidation cannot be exercised. The affidavit filed by the respondent No. 2 as Ex-Managing Director of the Company in liquidation cannot be looked into and should be ignored. He has further submitted that the present applications filed by the applicant are only for transfer of the pending proceedings from the Court of Metropolitan Magistrate, Ahmedabad to this Court under Section 446 (2)(a) of the Companies Act and, therefore, the reference is made to the earlier proceedings before the Metropolitan Magistrate Court is not relevant at present for any purpose. There is no question of delaying the matter as alleged. On the contrary, though the respondent No. 2 has no authority to proceed further with the matter, he is trying to delay the proceedings and harass the applicant Company and its Officers. Since the Company was wound up on 27.12.2001, any action taken by respondent No. 2 on behalf of the Company is without any authority and hence, delay, if any, is not caused by the applicant and/or Officers of the applicant but the respondent No. 2 is trying to

exercise the authority which he does not have in law. Mr. Gandhi has also denied the allegations made by the respondent No. 2 in his affidavit that the accused have misappropriated any amount. Mr. Gandhi has denied the contents of the affidavit that the Company Court does not have power or jurisdiction to stay criminal prosecution for offences committed before a Provisional Liquidator appointed and order for winding up was made. Lastly, Mr. Gandhi has submitted that the applicant is not praying for any stay of the criminal proceedings but is only praying for transfer of the said proceedings to this Court with a view to see that the same are expeditiously and judicially decided.

22.Pursuant to the notice issued by this Court on 27.06.2005 on Opponent Nos. 3 to 6, Mr. K.M. Modh, learned advocate appeared for Opponent Nos. 3 to 6 and adopted all the arguments canvassed on behalf of the applicant Company. He has also submitted that Opponent Nos. 3 to 6 have no objection if all

the criminal complaints which are pending before the Metropolitan Magistrate, Court No. 5, Ahmedabad are transferred to this Court for expeditious disposal of the same.

23.After having heard the learned Advocates appearing for the parties and the after having considered their respective pleadings and averments and allegations made in the complaints as well as the order passed by the learned Magistrate on 25.02.2004 and authorities relied on by both the parties, the Court is of the view that the learned Magistrate has committed very serious error in law and on facts in allowing the complainant, Mr. Approva J. Shah, to proceed with the complaints as admittedly, he had filed the said complaints in the capacity of the Chairman of Gujarat Steel Tubes Limited, which had subsequently gone into liquidation. As per the provisions contained in Section 445 (3) of the Act, winding up order passed by the Court, shall be deemed to be notice of discharge to the Officers and Employees of the

Company except when the business of the Company is continued. Winding up order was passed by this Court on 27.12.2001 in Company Petition No. 07 of 2001. From that date onwards, the Official Liquidator was put in charge of all affairs and assets of the Company in liquidation and all the Directors including the Chairman ceased to be the Directors and they have no authority or power to continue any suit or proceedings including criminal proceedings filed by any one of them on behalf of the Company, prior to the winding up order passed by this Court. When this fact was pointed out by the present applicant and an application was moved before the learned Magistrate on 29.07.2003 for issuance of notice to the Official Liquidator, instead of considering the said application in accordance with statutory provisions contained in the Companies Act, 1956, the learned Magistrate has refused to issue such notice and rejected the said application on the ground that the accused have not pointed out any statutory provision nor any evidence was produced with regard to the winding up

of the Company. The learned Magistrate has erroneously held that the accused have not pointed out any object or purpose for which the notice was sought to be issued on the Official Liquidator. All these reasons given by the learned Magistrate while rejecting the application, are absolutely irrelevant and untenable. If the complaints are filed by any Director or Officer of the Company not in his individual capacity, but in the capacity of such Director or Officer, on winding up order being passed by the Court, the Official Liquidator enters in the shoe of such Director or Officer and he only can prosecute the said complaint. It is the duty of such Director or Officer who has filed the complaint on behalf of the Company to point out to the Court that now the winding up order is passed and he ceased to be the Director or Officer of the Company and he is no more authorised to represent the Company. Instead of adopting this course of action, the application moved by the present applicant was strongly opposed and based on such opposition, the learned Magistrate has rejected the

application and refused to issue notice on the Official Liquidator. It is nothing but the travesty of justice and an obvious violation of the statutory provision. The Court, therefore, finds much force in the arguments of Mr. Gandhi and grants the prayer made in the present application to transfer all the four criminal complaints from the Court of learned Magistrate to this Court.

24.There is one more reason to get these complaints transferred to this Court. It prima facie appears to the Court that the complaints filed by the Chairman prior to the winding up of the Company are nothing but the counter-blasts as the present applicant has initially filed Summary Suit for recovery of an amount of Rs. 5,95,73,087/- against the Company as well as the respondent No. 2. Subsequently, several criminal complaints were filed under Section 138 of the Negotiable Instruments Act, inter alia, against the Company and the respondent No. 2. To get himself relieved from the clutches of these legal – civil as well as

criminal proceedings – the respondent No. 2 seems to have filed these complaints against the applicant and respondent Nos. 3 to 6. An ill intention or bad motive can as well be presumed from the fact that the respondent No. 2 did not want the Official Liquidator to prosecute these complaints as he wished to continue the same by himself which is otherwise not permissible under the law. If the complaints are false, fictitious or vexatious, the Official Liquidator may not prosecute the same. Having apprehended this eventuality, the respondent NO. 2 might have objected to the issuance of notice to the Official Liquidator. Be that as it may, the wrong committed by the learned Magistrate cannot be perpetuated by retaining the complaints on his file and interest of justice would be served if all these four complaints are ordered to be transferred to this Court.

25.Transfer of these four complaints to this Court is also more practicable, feasible and convenient to

the Official Liquidator as the complainant being Ex-Chairman of the Company is now required to be substituted by the Official Liquidator and he is day in and day out appearing before this Court. He can neutrally and independently examine the complaints without there being any biased mind of the original complainant. These are the complaints by the Company and not against the Company and hence, on careful consideration or close scrutiny of the complaints or the charges and/or allegations made therein, an objective decision may be taken as to whether complaints are worth fighting. The Court does not allow the respondent No. 2 to prosecute all the aforesaid four complaints pending before the learned Magistrate's Court and after the same having been transferred to this Court, directs the Official Liquidator to go through the said complaints and all other documents and to take decision independently as to whether the same should be further continued. While taking this decision, the Court takes into consideration the historical evolution of Section 446 of the Act,

which is succinctly traced by the Hon'ble Supreme Court in the case of **Suddarshan Chits (I) Ltd. V/s. O. Sukumaran Pillai, (1985) 58 Company Cases 633**, wherein it is held that “to save the Company which is ordered to be wound up from this profitless and expensive litigation and to accelerate the disposal of winding up proceedings, the parliament devised a cheap and summary remedy by conferring jurisdiction on the Court winding up the Company to entertain petitions in respect of claims for and against the Company. This was the object behind enacting Section 446 (2) and, therefore, it must receive such construction at the hands of the Court as would advance the object and at any rate not thwart it.

26. The proceedings enumerated in the affidavit-in-reply filed by the respondent No. 2 and heavily emphasised by Mr. Soparkar, were all prior to the date of winding up order. After the winding up order, the whole scenario or complexion of the proceedings is changed. It is not open for the

respondent No. 2 – the Ex-Chairman to champion the cause of the Company in liquidation and that too, for making counter attacks on the applicant and the respondent Nos. 3 to 6. Moreover, reliance placed by Mr. Soparkar on the decision of Bombay High Court in the case of Ion Exchange Finance Limited (Supra) would not render much assistance to the respondent No. 2. First of all, in that case, the proceedings were initiated against the Company and others. Those proceedings were in the nature of proceedings under Section 138 of the Negotiable Instruments Act. For continuation of such proceedings, the Company Court's permission may not be necessary. But, if some one from the Ex-Management of the Company has initiated criminal proceedings against others, the same criteria or parameters may not apply. The said decision is, therefore, distinguishable on facts.

27. In view of the above discussion and in light of the decisions relied on by Mr. Gandhi, the Court hereby allows all these four applications and

direct the learned Metropolitan Magistrate, Court No. 5, Ahmedabad to transfer the records and proceedings of Criminal Case Nos. 1698 to 1701 of 2000 forthwith to this Court and further directs the Registry to renumber the same, if so required, after they are transferred to this Court and the Official Liquidator to examine the said complaints and proceed with the same before this Court in accordance with law.

28.With the aforesaid directions and observations, all the four applications are accordingly disposed off.

[K.A. PUJ, J.]

Savariya